72-868

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 72-868

GLENN W. BRICKER,
Petitioner

vs.

HENRY D. CRANE, JR., ET AL.,
Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Glenn W. Bricker
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Petitioner, Pro se

December 14, 1972

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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The petitioner, Glenn W. Bricker, who appears pro se, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in case No. 72-1154.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit, not yet reported, appears in Appendix A hereto. The opinion, rulings and orders of the court of first instance, the United States District Court for the District of New Hampshire, appear in Appendix B, C, D and E.

## JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on November 7, 1972, Appendix A infra. A timely motion for enlargement of time for filing petition for rehearing was denied on November 21, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. In a case where certiorari was denied by this Court in former sought after relief, is it repugnant to the Constitution of the United States for parties to be denied the rights secured to them by the due process and equal protection clauses of the

Fourteenth Amendment because an important question of federal law has not been settled by this Court?

2. In a case where certiorari was denied by this Court in former sought after relief in a matter where a constitutional question was raised, should the doctrine that precludes a party from going to the federal court once they have chosen the state court be limited to those cases in which the state court recognizes the existence of the constitutional right and then adjudicates that it has not been violated?

3. In a matter involving a claim of violation of due process by state action under the Fourteenth Amendment, where a state court has made a final determination that no state action existed, in conflict with rulings of several federal circuit courts in substantially similiar cases, should the doctrine that precludes a party from going into the federal court once they have chosen the state court be limited to those cases in which the state court recognizes the existence of the constitutional right and then adjudicates that it has not been violated?

4. Is the financial assistance provided a private non-profit hospital in the form of tax-relief granted, the reception of federal funds under the Hill-Burton Act and other government programs, and funds appropriated by local municipal governments sufficient to cloak the hospital and its medical staff with the mantle of state law?

5. Is a state chartered private hospital, organized and operated as a charitable, non-profit, tax-exempt corporation, which obtains federal financial assistance in the form of tax-relief granted and funds received under the provisions of the Hill-Burton Act and other government programs, and funds appropriated by local governments, so linked with the state that the Fourteenth Amendment imposes due process and equal protection limitations on its removal of tenure status of physicians who are members of its staff?

6. Is the tenured staff physician of such a hospital denied due process when the hospital refuses to give him notice of

charges against him either before or during the administrative hearing on which the removal action will be based?

7. Is the physician denied due process when the hearing body receives and considers, on the question of his fitness to retain tenure, evidence of the fact that he testifies for plaintiffs in medical malpractice actions?

8. Where a physician is a member of the class of doctors who have testified against doctors and/or hospitals in medical malpractice cases and thereafter becomes the victim of a conspiracy to punish him for having so testified, is the nature of the conspiracy such that the conspirators would be liable under the provisions of 42 U.S.C. §§ 1985(2) and 1985(3)?

9. Where there are other members of the class throughout the country, does the fact that a physician might be the only class-member in a state bar him from invoking the provisions of 42 U.S.C. §§ 1985(2) and 1985(3)?

10. When at the time a state court action is instituted, some of the events of a developing conspiracy have not taken place and still others had not taken place at the time of culmination of the state court proceeding, in a matter involving a claim for damages alleging a conspiracy in violation of the Civil Rights Act of 1871, as amended, and set forth in 42 U.S.C. §§ 1981, 1983 and 1985, and where the federal district court has found that the acceptance of Hill-Burton funds is sufficient to cloak a private hospital and its medical staff with a mantle of state law, does the finding that there was no state action, made by the state court in the prior case, wherein the physician sought reinstatement to the hospital's medical staff on ground of wrongful failure to reappoint, bar litigation of the claimed violation of his civil rights under 42 U.S.C. 1983?

## CONSTITUTIONAL PROVISIONS INVOLVED

### United States Constitution, Amendment 14

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATUTES INVOLVED

### Civil Rights Act 42 U.S.C. § 1981

**Equal rights under the law**

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

### Civil Rights Act 42 U.S.C. § 1983

**Civil action for deprivation of rights**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

### Civil Rights Act 42 U.S.C. § 1985(2)

**Obstructing justice; intimidating party, witness, or juror**

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to

influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

**Civil Rights Act 42 U.S.C. § 1985(3)**

**Depriving persons of rights or privileges**

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

## STATEMENT OF THE CASE

Petitioner is a physician, a general practitioner, who engages in the practices of medicine and surgery and in addition thereto devotes a portion of his time to practice in the field of Legal Medicine. He is qualified for membership on the "active staff" of Respondent Sceva Speare Memorial Hospital, a privately incorporated charitable, non-profit, tax-exempt corporation. Appointments to the active staff are made annually. In October, 1970, petitioner, who had been a member of the hospital's medical staff since 1963, was denied reappointment. He sought relief in the state court and in that litigation he complained against the respondent hospital's proceedings which led to his denial on the ground of wrongful failure to reappoint. See Bricker v. Sceva Speare Memorial Hospital, 111 N.H. 276, 281 A.2d 589 (1971) cert. den., 40 L.W. 3279 (1971).

Throughout the past twenty years petitioner has from time to time been a state consultant and witness in various criminal matters including criminal medical malpractice. He has also participated in the investigation and preparation of civil causes and has been a witness in state and federal courts on behalf of plaintiffs in personal injury and medical malpractice cases. Petitioner is a Deputy Medical Referee for the County of Grafton and the State of New Hampshire having been so appointed in 1969, and a Senior Aviation Medical Examiner for the Federal Aviation Administration having been originally appointed in 1963.

During June and July of 1970, petitioner testified against a doctor and a hospital in a civil medical malpractice case. At the August, 1970, meeting of the medical staff of respondent hospital (the first meeting to take place following the conclusion of the malpractice trial) the staff voted to recommend to the appointing body, the lay Board of Directors, that petitioner be denied reappointment.

The credentials committee of the staff (a distinct body whose membership, by by-law, is identical with the active staff) took

the same action a few days later at a meeting of which petitioner, a member, received no notice. However, respondent hospital notified petitioner that his non-reappointment had been recommended, and advised him of his hearing rights before the joint conference committee (the presidents and vice-presidents of the board of directors and the medical staff) and the credentials committee sitting as an appellate tribunal.

Petitioner requested the hearing, which was then duly scheduled, and he also requested an advance specification of the charges against him. The latter request was refused and no statement of complaints against his conduct or qualifications was given him by the respondent hospital either before or at the hearing. Respondent Wadleigh later testified that he decided not to give petitioner a list of the charges against him in order to preclude petitioner from erecting a defense. (D.E., 31½ Ex. 10, pages 47-48)

The hearing, which took place on October 14, 1970, lasted several hours and consisted mostly of petitioner's attempts first to learn the specifics of the complaints against him and then refute, on the spot, those that were stated.

Complaints presented against petitioner at that hearing, as well as later testimony presented by the respondent hospital in the state court litigation, included objections to his practice of testifying for plaintiffs in medical malpractice actions.

Following the hearing a vote was taken and it was decided to recommend that petitioner be denied reappointment to the medical staff. The reasons for the action taken were not specified. Respondents Wadleigh and Cayley (the president and vice-president of the respondent hospital) reported orally to the board of directors on the reasons for the recommendation. The board voted to deny reappointment and the president notified petitioner by letter on October 20, 1970, again without specification of reasons.

Petitioner immediately sought temporary and permanent injunctions against respondent hospital in the state court

alleging that he had been denied "due process of law" in the respondent hospital's proceedings. The state court issued a temporary injunction on December 1, 1970.

In March, 1971, petitioner received a notice from a councilor of New Hampshire Medical Society (hereinafter referred to as the "Society") that he had been charged with ethical misconduct in connection with his activities in the medical malpractice case in which he testified during July 1970. On April 21, following a hearing before the society's council, at which Respondent Soden served as legal adviser to the council, petitioner was notified that he had been indefinitely suspended from the Society. Petitioner promptly sought relief in the state court.

Meanwhile, the state court proceeding in petitioner v. respondent hospital came on for a hearing on the merits and on May 17, 1971, petitioner's petition for injunction was dismissed. The discharge of the temporary injunction was stayed pending an appeal to the Supreme Court of New Hampshire.

On July 7, 1971, the state court, after a hearing on the merits in Bricker v. New Hampshire Medical Society, Grafton County Equity No. 11,642, in which Respondent Soden appeared as counsel for the society, set aside petitioner's indefinite suspension from the society.

The state court proceeding in petitioner v. respondent hospital came on to be heard on appeal before the Supreme Court of the State of New Hampshire which on July 29, 1971, handed down its decision. The exceptions of petitioner were overruled and his petition dismissed. Bricker v. Sceva Speare Memorial Hospital, 111 N.H. 276, 281 A.2d 589 (1971). Mandate was stayed pending appeal to this Court.

On September 29, 1971, a Petition for Writ of Certiorari to the Supreme Court of New Hampshire was filed in this Court at No. 71-462.

As a result of the urging of Respondents Crane and Soden the Petition of New Hampshire Medical Society to Determine Licensee's Fitness to Continue to Hold License to Practice Medicine was filed with the Board of Registration in Medicine for the State of New Hampshire (hereinafter referred to as the "Board"). On November 24, 1971, the Board had a copy of the petition of the Society and an Order of Notice of Hearing served on your petitioner. Among the allegations made on behalf of the Society, Respondent Soden wrote:

> In the fall of 1970, Dr. Bricker failed to gain reappointment to the staff of Sceva Speare Memorial Hospital in Plymouth, New Hampshire, where he had been a member of the staff in one capacity or another since 1963. Litigation instituted by Dr. Bricker ensued, and in the course of upholding the action of the hospital authorities, Judge Johnson of the New Hampshire Superior Court made findings as follows:
>
> > "The Court finds as a fact that Dr. Bricker has been a disruptive force at the Sceva Speare Memorial Hospital; that he has acted in a way detrimental to the best interests of the institition; that he has acted in a way which is detrimental to the good practice of medicine by other members of the Medical Staff of the Hospital; that he has acted in a way which is disruptive to the nurses and other administrative staff of the Hospital; that he has conducted his personal life in such a way as to cause great personal concern and anxiety to the other members of the Medical Staff and the Directors of the Hospital; and that his actions have had, in general, an adverse effect upon the smooth-working relationships so necessary for adequate and essential health care. Finally, the Court

> finds that Dr. Bricker has conducted his medical practice, on occasion, in a way that could at best be described as unwise and at worst as highly unprofessional . . ."

The Supreme Court of New Hampshire, in an opinion dated July 29, 1971, which is attached hereto and made a part hereof, held that the evidence completely supported the foregoing findings, and upheld the Superior Court's decision.

Rather than call before this Board all the witnesses whose testimony served as the basis for the foregoing findings, it is the Petitioner's intention to introduce into evidence a complete transcript of the proceedings.

The date for the hearing set forth in the Order of Notice was December 28, 1971.

On December 14, 1971, the following order was entered by this Court in Bricker v. Sceva Speare Memorial Hospital at No. 71-462: 40 L.W. 3279 (1971):

> "The motion of American College of Legal Medicine for leave to file a brief, as amicus curiae, is granted. The petition for a writ of certiorari is denied. Mr. Justice Douglas is of the opinion that certiorari should be granted and the case set for oral argument."

On December 28, 1971, the hearing on the petition of the Society commenced before the Board and by the close of the second day of the hearing it was evident that there was substantial inaccuracy in the damaging testimony produced by Respondent Crane and witnesses called by the Hospital against your petitioner during the original state court proceedings, the complete transcript of said proceedings having been put into evidence by Respondent Soden.

The Clerk of this Court was notified that no motion for rehearing would be filed and he was requested to return the certified record to the Supreme Court of New Hampshire.

On January 7, 1972, Respondent Wadleigh wrote your petitioner that he had been advised by Respondent Millham that the temporary injunction was no longer in effect and that petitioner's right to use the facilities of the Hospital were terminated.

On January 10, 1972, a motion for new trial together with a motion to extend the temporary injunction in Bricker v. Hospital at No. 11,397 was filed in the Superior Court of New Hampshire.

There was a hearing on the motions on January 12, 1972, and at 5:30 p.m. that afternoon the Court entered an order directing petitioner to comply with the contents of the letter from Respondent Wadleigh. The order included the following statement:

> "Further orders of the Court shall be issued as soon as practicable on the plaintiff's motion for new trial and supplement to motion for new trial, and the plaintiff's motion to extend temporary injunction."

At 9:30 a.m. on the morning of January 13, 1972, petitioner appeared pro se in the United States District Court for the District of New Hampshire and filed his Complaint (Petition for Injunction). At 12:30 p.m. the Court orally denied the motion for injunctive relief.

On January 14, 1972, at 8:45 a.m. petitioner filed his notice of appeal along with security in the amount of $250.00 as required. Simultaneously, the District Court dismissed petitioner's complaint on its own motion. At 11:30 a.m. that morning, petitioner filed an application for injunctive relief pending appeal in the United States Court of Appeals for the First Circuit at Miscellaneous Number 554. At 12:15 p.m. that afternoon petitioner was heard, ex parte. Later that afternoon,

the Clerk of the District Court notified petitioner that an order granting the injunctive relief sought had been issued.

Numerous motions were filed on behalf of the respondents and on February 11, 1972, a preliminary pretrial conference and a hearing on all pending motions was held in the District Court.

On February 29, 1972, the Board of Registration in Medicine for the State of New Hampshire, after five day-long hearings at which they heard testimony from more than 40 witnesses, among them Respondents Crane, DeWitt, Kirk-Hurme, Johnson, and McIver, (members of the Hospital's medical staff who had testified in the state court proceedings) and Respondents Millham and Soden, (counsel for the Hospital and the Society respectively) reviewed 34 exhibits, among them medical records of petitioner's patients, minutes of the Hospital's medical staff meetings, excerpts from minutes of meetings of the Society, and the complete transcript of the proceedings in the Superior Court of the State of New Hampshire in Bricker v. Hospital at No. 11,397, by unanimous decision, entered an order denying the petition of the Society.

The Board found that the only rules of the respondent hospital which petitioner had broken were those related to medical record completion and the time for making rounds, "rules which have been honored in the breach of every member of the hospital's medical staff."

Sequestration of witnesses was ordered by the Board at the outset of the hearing, and the Board found that Respondent Millham, counsel for several of the witnesses at the hearing, including Respondent McIver, left the hearing-room while Respondent McIver was testifying to talk to his other clients. Some of those clients had not yet testified.

The Board found that testimony presented before it showed the substantial inaccuracy of damaging testimony produced by Respondent Crane against petitioner herein in the original proceeding before the Superior Court, reported in the Berlin

Record (D.E. 31½ Ex. 7) and by witnesses called by the hospital against petitioner, not only in the Berlin Record, supra., but also in the transcript of the oral proceeding (hearing on the merits) before the State Trial Court (D.E. 31½ Part 2)., and that there were irregularities in the minutes book of the medical staff of the respondent hospital.

Although the proceeding before the Board was solely for the purpose of determining whether your petitioner was fit to hold a license to practice medicine in the State, the Board stated that it should be considered in a light consistent with their decision that there was no evidence to support findings that your petitioner had ever; conducted his practice of medicine in a way that could be described as unwise or unprofessional, been guilty of gross misconduct in the practice of his profession or that his personal habits had been such as to unfit him for the practice of medicine.

The Board held to be consistent with their decision the findings that your petitioner is a part-time specialist in the field of Legal Medicine and that his activities in that field in no way suggest that he has conducted that portion of his practice in a way that could be described as unprofessional, unethical, or immoral.

Most importantly, the Board held to be consistent with their decision the finding that your petitioner's behavior at Respondent Sceva Speare Memorial Hospital had never been inappropriate or lacking in professional manner.

The Memorandum Opinion of the District Court was entered March 3, 1972. The Court (Bownes, J.) while recognizing its jurisdiction under 28 U.S.C. § 1343(3), dismissed the complaint as to all defendants on various grounds of res judicata, collateral estoppel and failure to state a cause of action. It was ordered that the preliminary injunction remain in full force and effect until the appeal period expired or, if an appeal were taken, until final decision. Appendix B. Supplemental rulings and orders were filed by the District Court (Bownes, J.) on March, 14, March 22 and April 3, 1972. Appendix C. D. and E.

Petitioner had not been given the opportunity to engage in discovery proceedings.

Notice of appeal to the United States Court of Appeals for the First Circuit was timely filed. The cause came on to be heard, was argued, and on November 7, 1972, judgment was entered. The orders of the District Court were affirmed.

On October 18, 1972, new evidence related to the state court proceeding was brought to the attention of petitioner and thereafter a motion for new trial on the grounds of newly discovered evidence was filed in the Superior Court. The evidence also contained matter relative to the instant case, e.g., medical malpractice actions seeking damages in the amount of $220,000.00 were commenced against Respondent Crane in the state court on July 7, 1970. On the same day medical malpractice actions seeking damages in the amount of $220,000.00 were commenced against Respondent Hospital. In these actions, Respondent Soden represents Respondent Crane. Respondent Soden's firm represents Respondent The Hartford Insurance Group in the instant case. Respondent Hospital who was insured by Respondent The Travelers Insurance Company is represented by counsel who in the instant case represents Respondents Millham, Murphy and Kirk-Hurme.

Circumstances surrounding the manner in which the aforementioned malpractice actions were brought to the attention of petitioner appeared in local newspapers. See document reproduced herein as Appendix F. A reproduction of said document was attached to respondent hospital's "OBJECTION OF APPELLEE, SCEVA SPEARE MEMORIAL HOSPITAL, TO APPELLANT'S MOTION FOR ENLARGMENT OF TIME FOR FILING PETITION FOR REHEARING" filed in the court below on November 20, 1972.

## HOW FEDERAL QUESTIONS ARE PRESENTED

Petitioner, a physician, after being refused in repeated attempts to engage counsel for what the New Hampshire Superior Court recognized to be an unpopular cause (D.E. 31½, Ex. 7, pages 157-159), originally appeared pro se, preparing and presenting his own "Petition for Injunction" and "Motion to Amend Petition for Injunction" (D.E. 31½, Part 1). He claimed not only specific violations by respondent hospital of its by-laws (paragraphs 11, 19 and 21), but also violations of his rights to "due process of law" (paragraphs 22 and 25) for several reasons set forth in other paragraphs.

In the interest of the Town of Ashland, its attorney was present, amicus curiae, at the hearing for temporary injunction. At the end of the first day of the hearing and as a result of the urging of the Court, counsel for the town agreed to represent petitioner and did so through the original state court proceeding.

Prior to the hearing on the merits he filed a "Motion to Amend Petition for Injunction" (D.E. 31½, Part 1) alleging respondent hospital's receipt of public funds, both federal and local, to emphasize that state action under the Fourteenth Amendment was involved. Respondent hospital acknowledged that the federal question had been raised in "Defendant's Answer to Plaintiff's Motion for Rehearing" (D.E. 31½, Part 9).

At 5:30 p.m. on January 12, 1972, following the nullification of the state court granted injunction, counsel informed petitioner that it would be impossible for him to prepare a pleading for presentation to the United States District Court for the District of New Hampshire the following morning. Time was of the essence, and in view of his prior experience, petitioner again appeared pro se, preparing and presenting his Complaint ("Petition for Injunction"; D.E. 1) the following day.

As in the state court proceeding, the District Court recognized the sensitive nature of petitioners position when he said, "I realize that it may be a problem," (to obtain counsel),

"since you have made some lawyers defendants in this case." (See Reporter's Transcript of Preliminary Pretrial and Hearing on All Pending Motions, February 11, 1972; D.E. 69, pages 128 and 129).

In paragraph 3 of the complaint petitioner alleged that the respondents, "solely as a result of the Plaintiff's participation in medical malpractice cases, have conspired to wrongfully and unlawfully deprive him of his capacity to earn his living and practice his chosen profession, in violation of the Fourteenth Amendment of the Constitution of the United States, the Civil Rights Act of 1871, the First Amendment of the Constitution of the United States, the Fifth Amendment of the Constitution of the United States and other rights reserved to him by the laws and Constitution of the United States."

Petitioners pleadings contained many faults, as the opinions of the courts below indicate. However, when petitioner sought to amend his complaint under F.R.Civ.P. 15(a) and (b), (D.E. 67), the District Court denied his motion (Appendix C).

In the motion, petitioner sought to amend his complaint by adding allegations, among them allegation 30, which although not spelled out in the pleading, petitioner believes alleges a violation of 42 U.S.C. § 1985(2). Fairly read, petitioner alleged that the respondents committed the acts complained of because he testified at medical malpractice trials on behalf of the plaintiffs in such suits. The respondents are attempting to punish or banish the plaintiff for violating their "Conspiracy of Silence" as regards medical malpractice cases. In that regard, petitioner sought to allege that he belongs to a CLASS of doctors who have become targets because they have testified in malpractice cases. This is not a class of one situation. (See L'Orange v. Medical Protective Company, 394 F.2d 57 (CA-6 1968) and comments on this case, with further authorities, in 47 Texas Law Review 152.) Also of interest are the facts behind Silver v. Castle Memorial Hospital, Hawaii Supreme Court, No. 4998 ___ H. ___, 497 P.2d 564 (1972) and Beane v. Perley, 99 N.H. 309, 312: 109 A.2d 848, 850 (1954).

In the concurring opinion of Abe, J. in Silver, supra., there appears a most illuminating expression of judicial awareness.

> "Against the positive need for hospital supervision of the competence of physicians, I weigh the risks of giving such supervisory powers to hospitals. Whenever a hospital appoints a group of its doctors to a "credentials committee" and empowers them to supervise the competence of other doctors, there is a grave danger that the members of the committee will seek to exclude doctors because they are competitors, because they are Black, or Jewish, or Haole or Oriental, because they have testified against them in malpractice suits, or simply because they do not like them. Requiring a credentials committee to act out a charade of seemingly fair procedures does little to minimize the danger that the committee will draw its conclusion for reasons not present in the record and that danger exists regardless of where the burden of proof is allocated. The root problem is that a credentials committee can never be expected to act with the disinterestedness of the Board of Medical Examiners." (Emphasis supplied)

The Board of Registration in Medicine for the State of New Hampshire in the counterpart of Hawaii's Board of Medical Examiners.

## REASONS FOR GRANTING THE WRIT

I THE DECISION BELOW VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE IT SUSTAINS RESPONDENTS' DEPRIVATION OF PETITIONER'S TENURED STAFF STATUS WITHOUT NOTICE OF CHARGES, IN CONFLICT WITH DECISIONS OF THE COURT AND UNITED STATES COURTS OF APPEALS.

The State Court has decided a federal question of substance not theretofore determined by this Court, i.e. the State Court decided that the acceptance of federal (Hill-Burton) funds and town (tax raised) funds was insufficient to cloak a private hospital (organized and operated as a charitable, non-profit, tax-exempt corporation) and its medical staff with a mantle of state law, and having so decided, held that petitioner was not entitled to the protection imposed by the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

The State Court decision was in conflict with the decisions of the United States Courts of Appeals for the Fourth, Fifth and Sixth Circuits. Chiaffitelli v. Dettmer Hospital, Inc., 437 F.2d 429 (CA-6 1971); Sosa v. Val Verde Memorial Hospital, 437 F.2d 173 (CA-5 1971); Mizell v. North Broward Hospital District, 427 F.2d 468 (CA-5 1970); Sams v. Ohio General Hospital Assoc., 413 F.2d 826 (CA-4 1969); Meredith v. Allen County War Memorial Hospital Com'n., 397 F.2d 33 (CA-6 (1968); and Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (CA-4 1963).

Following the State Court decision, the District Court, in the instant case, recognized that the weight of authority held that the acceptance of Hill-Burton funds was sufficient to cloak a private hospital and its medical staff with a mantle of state law, ruled that color of state law had been properly alleged and that there was jurisdiction under 28 U.S.C. § 1343(3). Appendix B.

Fourteenth Amendment protections apply to staff appointment and removal procedures at state chartered private hospitals, like the respondent hospital, which receive substantial federal construction assistance under the Hill-Burton Act and operating and capital gifts from local government bodies. Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (CA-4 1963), cert. den. 376 U.S. 938; Eaton v. Grubbs, 329 F.2d 710 (CA-4 1964); Cypress v. Newport News General & Nonsectarian Hosp. Ass'n., 375 F.2d 648 (CA-4 1967); Sams v. Ohio Valley General Hosp. Ass'n., 413 F.2d 826 (CA-4 1969);

Foster v. Mobile County Hospital Board, 398 F.2d 227 (CA-5 1968), 37 ALR 3d 637. Each of these cases, it should be noted, involves the equal protection clause rather than the due process clause of the Fourteenth Amendment.

Due process in an administrative hearing implies the right to notice, and the right to notice implies a statement of charges in sufficient detail and sufficiently in advance of hearing to permit the preparation of a defense. While there is no simple formula to determine in advance the adequacy of notice under the due process clause in all situations, its adequacy must be judged,at least in part, against the relative difficulty or ease to the party giving notice of providing a full and adequate statement of the essentials of the matter to be considered, and the relative importance or unimportance of the matter to the party receiving the notice. Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950); Goldberg v. Kelley, 397 U.S. 254 (1970); Drown v. Portsmouth School District, 435 F.2d 1182 (CA-1 1970). As it was indicated in the statement of the case Respondent Wadleigh decided not to give petitioner a list of the charges against him in order to preclude petitioner from erecting a defense.

The petitioner submits that he, no less than the welfare recipients in the Goldberg case, is entitled under the Fourteenth Amendment to "timely and adequate notice detailing the reasons for a proposed termination" (397 U.S. 267 - 268). See also Sosa v. Board of Managers of Val Verde Memorial Hospital, 437 F.2d 173 (CA-5 1971) and Chiaffitelli v. Dettmer Hospital, Inc., 437 F.2d 429 (CA-6 1971) on the applicability of the due process clause to medical staff appointments.

It is further submitted that the conduct of both the respondent hospital, in basing its action on charges of which petitioner had no notice before the hearing, and the New Hampshire courts in affirming the hospital's respondent action after accepting proof of additional charges which were not specially pleaded, further violate petitioner's Fourteenth

Amendment due process rights as established by this Court in Re Ruffalo 390 U.S. 544 (1968).

In summary, petitioner's staff status with respondent hospital, as an institution substantially aided by federal and local governments, is well within the scope of Fourteenth Amendment protections against state action under the principle followed in the Simkins case (supra) and other cases cited from the Courts of Appeals in the Fourth, Fifth and Sixth Circuits. The Supreme Court of New Hampshire has here, in a situation within the scope of Fourteenth Amendment limitations, decided a substantial question of due process against the party claiming the protection of that right and against the due process principles set forth by this Court in Re Ruffalo and Goldberg (supra).

The national scope of the Hill-Burton Act and the thousands of physicians and hospitals presently involved in staff membership relationships such as that which petitioner claims for himself here are factors to suggest that the discrepancy in the application of these principles between the Supreme Court of New Hampshire and the courts in the federal jurisdiction might now appropriately be corrected.

II THE DECISION BELOW VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, AND THE STATUTES OF THE UNITED STATES AND OTHER CONSTITUTIONAL PROVISIONS BECAUSE IT SUSTAINS RESPONDENTS' DEPRIVATION OF PETITIONER'S TENURED STAFF STATUS FOLLOWING HEARING AT WHICH EVIDENCE OF PETITIONER'S TESTIMONY IN MEDICAL MALPRACTICE CASES PER SE WAS ACCEPTED AS A SUBSTANTIAL CHARGE AGAINST HIM.

Question 7 presented here (page 3 supra.) is an important matter. It is submitted that for the respondents and the state courts to have accepted as valid complaints against petitioner's

tenure the fact that he testifies as an expert witness for plaintiffs in medical malpractice actions, and to have justified their decisions against petitioner, in part, on the basis of that activity (with no showing that the testimony he gives is in any way improper per se), violates petitioner's rights under the equal protection and due process clauses of the Fourteenth Amendment and his rights of free speech under the First Amendment, not to mention the fact that it raises serious questions in regard to the administration of the courts. The respondents' discrimination against the petitioner because of his activities in the field of Legal Medicine and the fact that he testified in medical malpractice cases is an infringement upon his personal right to practice his profession and express his professional opinion before the courts of the land. The petitioner is, as a result of the action by respondents and the courts, unfairly and unjustly classified in violation of the Fourteenth Amendment. (See Sams v. Ohio Valley General Hospital Association, 413 F.2d 826 (CA-4 1969).

The powerful arguments of public policy against any practices tending toward intimidation of witnesses generally and expert witnesses for plaintiffs in medical malpractice cases particularly, are well summarized in L'Orange v. Medical Protective Company, 394 F.2d 57, 60-63 (1968).

Respondents' actions are akin to the crime of influencing a witness not to testify. 18 U.S.C. § 1503.

It should also be noted that a lawyer who attempts to do what respondents pursues as a matter of policy (See testimony of Respondent Roberts; D.E. 31½, Exhibit 7, page 251) would be subject to censure or even disbarment. 7 Am Jur 2d, Attorneys at Law, Section 27. Code of Professional Responsibility of the American Bar Association, Canon 7, Ethical Consideration 7-27, Disciplinary Rule 7-109 (A) and (B), and note 89.

III LAWS EXIST TO SERVE PEOPLES' NEEDS, NOT SOME JUDICIALLY CREATED DOCTRINE THAT HAS BEEN HERETOFORE ESTABLISHED, AND WHICH NOW GIVES RISE TO IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

At no time during the state court proceedings was the professional competence of petitioner questioned. In fact, there was evidence to the contrary. (D.E. 31½, Ex. 7 at 82-84) Yet shortly after January 11, 1972, it was reported that Respondent Murphy had made the false assertion that petitioner was not a competent doctor.

The true underlying cause for the action taken against petitioner was the fact that he testified in malpractice cases. However, as a subterfuge, certain of the respondents made vague, spurious allegations against him with respect to regulations violations, and his personal conduct and behavior at respondent hospital.

There was a subjective indication to petitioner that an attempt was being made to deny him the opportunity to earn his livelihood, but there was no objective evidence apparent prior to October 22, 1970, to which petitioner felt a neutral judicial third party would be responsive. There was a collusive concealment of motive by the actual activating forces. In a sense some of the respondents were misleading the state courts as to what they actually intended to accomplish by alleging certain things that were real, partially real or completely unreal, but not really the actual basis for their complaint against petitioner.

Because the respondents have deliberately, through a choice of mechanism, veiled their real motive collusively, petitioner has been placed in a position where he could not respond to their real motives in 1970 and is being barred, by the invocation of a judicially created doctrine, from responding in 1972.

The doctrine that would preclude a party from going to the federal court once they have chosen the state court ought to be limited to those cases in which the state court recognizes the existence of the constitutional right and then adjudicates that it has not been violated.

But – where the state court says that there is no right by virtue of the fact of no state action, therefore no federal constitutional issue is involved, and later a federal judge finds that there was state action, it seems to petitioner that the doctrine of collateral estoppel or res judicata should not be applied to foreclose a constitutional right, to foreclose its very existence.

If the state court had said, yes, in this area there was state action sufficient to require compliance with the Fourteenth Amendment, and then they said, but what was done satisfied the rudiments imposed by that constitutional amendment, – if a plaintiff chooses to litigate in the state court and the state court says the Fourteenth Amendment applies but it was not violated, it is petitioners contention that, then, and then only, should that plaintiff be barred from proceeding de novo in the federal courts. (See Appendix B, Footnote 7, page 42, infra.)

Petitioner interprets the Memorandum Opinion of the District Court to say in essence:

(1) I rule the respondent hospital, its privies and its medical staff are cloaked with a mantle of state law.

(2) I rule that color of state law has been properly alleged and that there is jurisdiction under 28 U.S.C. § 1343(3).

(3) I rule that the meaning or application of the Fourteenth Amendment of the Constitution of the United States is at issue in the instant case.

(4) I rule that I am going to abridge the constitutional rights of the petitioner because the state court disagreed with me on the question of state action and I must recognize the

judicially created doctrines of res judicata and collateral estoppel.

(5) Therefore, the motions to dismiss are granted.

Petitioner suggests that it would be in the interest of justice for this Court to authorize the modification of the application of the doctrines of res judicata and collateral estoppel in matters wherein there are conflicts of law between the state and federal courts in all cases in which the meaning or application of the Constitution and laws of the United States is a principal element in the position of any party.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

GLENN W. BRICKER
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Ashland, New Hampshire 03217

December 14, 1972

# United States Court of Appeals
## For the First Circuit

No. 72-1154

GLENN W. BRICKER, M.D.,

PLAINTIFF, APPELLANT,

*v.*

HENRY D. CRANE, JR., M.D., ET AL.,

DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Before COFFIN, *Chief Judge*,
McENTEE, *Circuit Judge*,
HAMLEY,* *Senior Circuit Judge*.

*Glenn W. Bricker, M.D.*, pro se.

*Eugene M. Van Loan, III, Martin L. Gross, W. Wright Danenbarger*, and *Frederic K. Upton*, with whom *Sulloway, Hollis, Godfrey & Soden, Devine, Millimet, Stahl & Branch, Sheehan, Phinney, Bass & Green, Paul E. Nourie, Wiggin, Nourie, Sundeen, Pingree & Bigg, Wadleigh, Starr, Peters, Dunn & Kohls, Upton, Sanders & Upton, Peter V. Millham*, and *Wescott, Millham & Dyer* were on briefs, for appellees.

November 7, 1972.

McENTEE, *Circuit Judge*. This is an appeal from the district court's dismissal of an action brought under the Civil Rights Act of 1871. Appellant, Dr. Glenn W. Bricker, is a physician duly licensed to practice medicine in the State of New Hampshire. In August 1970, he received notification that the Credentials Committee of defendant Sceva Speare Memorial Hospital had recommended that he

* Of the Ninth Circuit, sitting by designation.

not be reappointed to the hospital's medical staff. Following receipt of this notification, Dr. Bricker made extensive efforts to obtain the minutes of the meeting at which this action had been taken, as well as a specification of the charges against him. Although these efforts were unavailing, he was afforded an appeal procedure which included a personal appearance before the hospital's Credentials and Joint Conference Committees. Upon being finally informed that he would not be reappointed to the medical staff, Dr. Bricker commenced an action for injunctive relief against the hospital in New Hampshire Superior Court.

In essence, Dr. Bricker alleged that his nonreappointment was due to his activities as a specialist in the field of legal medicine, which sometimes entailed testifying against other doctors in medical malpractice actions. Along with other allegations not relevant here, appellant claimed that the hospital's failure to provide him with a specification of charges violated his right not to be deprived of property without due process of law and that his nonreappointment to the hospital staff was arbitrary, capricious and unreasonable. In its decision of May 17, 1971, the Grafton County Superior Court ruled that Sceva Speare was a private hospital and that its by-laws did not require that Bricker be given a written specification of the charges against him. The court further held that Bricker had been a disruptive influence at the hospital, that his medico-legal activities had not played a substantial role in his nonreappointment and that the hospital's actions were therefore neither arbitrary nor unreasonable. The superior court's findings of fact and rulings of law were affirmed by the Supreme Court of New Hampshire which specifically held that "the acceptance of federal and town funds... has not changed the private character of defendant hospital." *Bricker* v. *Sceva Speare Memorial Hospital,* 281 A.2d 589, 592, *cert. denied,* 404 U.S. 995 (1971).

After the denial of his petition for a writ of certiorari, Bricker commenced the present action in the district court. In addition to the hospital, he named as defendants certain members of the Sceva Speare Medical Staff and Executive Committee, a number of insurance companies and three attorneys who represented several of the other defendants. His complaint alleged the existence of a broad-based conspiracy to deprive him of his capacity to practice medicine, solely because of his testimony in malpractice cases, in violation of the first, fifth and fourteenth amendments to the United States Constitution, and the Civil Rights Act of 1871.[1] The complaint further alleged that Bricker's nonreappointment to the Sceva Speare staff was a result of this conspiracy,[2] that he had not been informed of the charges against him prior to his exclusion from the hospital and that the hospital received certain monies from the state and federal governments under the Medicare Program and the Hill-Burton Act. Stripping this complaint to its "federal essentials," the district court construed it as alleging a deprivation of due process through the defendant hospital's refusal to provide appellant with the

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[1] Although the complaint did not specify any particular section of this act, the district court assumed reliance on 42 U.S.C. §§ 1983 and 1985(3).

[2] Other overt acts allegedly committed by the defendants in furtherance of the conspiracy include (1) causing a license revocation proceeding against the appellant to be filed with the Board of Registration in Medicine for the State of New Hampshire (the proceeding has terminated in Bricker's favor); (2) causing material alterations in records and suborning perjury in proceedings before state courts and quasi-judicial boards; (3) instituting a double standard at the hospital relative to regulations imposed; and (4) instituting a requirement that all members of the hospital staff carry malpractice insurance and then threatening to cancel and cancelling appellant's policy solely because of his testimony in a medical malpractice case. The complaint also alleges that the defendants introduced false testimony at a trial in which appellant appeared as an expert medical witness in order to discredit his previous testimony.

requested specification of charges. While recognizing its jurisdiction under 28 U.S.C. § 1343, the court dismissed the complaint as to all the defendants on various grounds of res judicata, collateral estoppel and failure to state a cause of action. We affirm the decision of the district court.

Our consideration of this appeal must begin with the doctrine of collateral estoppel.[3] Insofar as appellant relies on 42 U.S.C. § 1983,[4] he must demonstrate that, in denying him access to the facilities of Sceva Speare Memorial Hospital, the defendants acted under color of state law. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 150 (1970). It is unnecessary for us to decide whether the reception of funds under the Hill-Burton Act and other government programs was sufficient to imbue the hospital with state action,[5] since that issue has been conclusively determined against the appellant in the state courts.

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[3] Since "[t]he application of collateral estoppel in federal courts is no longer grounded upon the mechanical requirements of mutuality," *P. I. Enterprises, Inc.* v. *Cataldo*, 457 F.2d 1012, 1015 (1st Cir. 1972), the defense is available to all parties in the present action. *See Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313 (1971). Even if it could be argued that the insurance companies and defendants-attorneys Soden and Millham were not so related to the hospital as to be entitled to invoke the doctrine, we hold in any case that since there were no allegations of their participation in the challenged denial of reappointment and no other allegations coloring their actions with state law, no cause of action under § 1983 was made out as to those defendants.

[4] Section 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[5] *Compare Sams* v. *Ohio Valley General Hospital Association*, 413 F.2d 826 (4th Cir. 1969); *Smith* v. *Hampton Training School for Nurses*, 360 F.2d 577 (4th Cir. 1966); *Citta* v. *Delaware Valley Hospital*, 313 F. Supp. 301 (E.D. Penn. 1970) *with Place* v. *Shepherd*, 446 F.2d 1239 (6th Cir. 1971); *Mulvihill* v. *Julia Butterfield Memorial Hospital*, 329 F. Supp. 1020 (S.D.N.Y. 1971); *Wood* v. *Hogan*, 215 F. Supp. 53 (W.D. Va. 1963).

In *P. I. Enterprises, Inc.* v. *Cataldo*, 457 F.2d 1012 (1st Cir. 1972), this court held that the effects of collateral estoppel cannot be avoided by recasting an adjudicated issue in the form of an action under the Civil Rights Act. We noted in that decision the well settled principle that state courts are fully empowered to decide federal claims and that "[a] state court decision on constitutional issues is res judicata to the identical suit brought in federal court." *Id.* at 1014. We reiterate that the Civil Rights Act is not a vehicle for collateral attack upon final state court judgments, *Coogan* v. *Cincinnati Bar Association*, 431 F.2d 1209 (6th Cir. 1970); *Rhodes* v. *Meyer*, 334 F.2d 709, 716 (8th Cir.), *cert. denied*, 379 U.S. 915 (1964), and that a writ of certiorari to the United States Supreme Court is the only method by which such a decision may be reviewed. *See Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923). In the present case, appellant unsuccessfully sought such review after voluntarily litigating his federal claims in state court. Understandably disappointed with the outcome of this earlier litigation, he now seeks a happier result in a federal forum. But he is not entitled to an "encore."[6] *Angel* v. *Bullington*, 330 U.S. 183, 191 (1947).

Appellant argues, however, that whatever the effects of collateral estoppel, he has a subsisting cause of action under 42 U.S.C. § 1985(3).[7] Appellant bases this argument on

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[6] Appellant seeks to distinguish our decision in *P. I. Enterprises* by arguing that his constitutional claim was not, in fact, decided by the state courts. He reaches this somewhat startling conclusion by characterizing the New Hampshire courts' determination of the state action question as decisive only of a preliminary jurisdictional issue. It is, of course, crystal clear that a due process violation can never exist in the absence of state action, and appellant's contention is therefore frivolous.

[7] "If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or

the recent case of *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971), in which the Supreme Court held that § 1985(3) does not require state action but reaches private conspiracies aimed at the discriminatory deprivation of equal rights under the law. We note the holding of at least one federal court that, when the object of such a conspiracy is the deprivation of rights secured by the fourteenth amendment, a state involvement requirement survives *Griffin*. *See Dombrowski* v. *Dowling*, 459 F.2d 190 (7th Cir. 1972). We need not reach this issue, however, since appellant has failed to meet the minimum requirements for stating a cause of action under this section.

In *Griffin* v. *Breckenridge, supra*, the Court recognized "[t]he constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law." *Id.* at 102. In order to avoid these difficulties, the Court construed the statute to require, as an element of the cause of action, a showing of some invidiously discriminatory motivation.

> "The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based invidiously discriminatory animus behind the conspirators' action." *Id.* (Citations omitted.)

In his original complaint before the district court, Bricker did not claim that he was the victim of any class-based discrimination. Following the dismissal of his action,

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hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

he sought to amend the complaint to include an allegation that he was a member of a class of physicians who had been discriminated against because of their testimony in malpractice cases. While the court denied his motion for leave to amend, this additional allegation would not, in any event, suffice to state a cause of action under § 1985(3).

We recognize, of course, that we are generally required to treat the allegations of a complaint as true for purposes of a motion to dismiss. In the instant case, however, appellant has done no more than flatly assert his membership in a novel class which is neither readily recognizable nor among those traditionally protected by the Civil Rights Act. He has alleged no facts supporting the existence of such a class and admitted at oral argument that he might be the only class-member in New Hampshire. Under these circumstances, we hold that appellant has not sufficiently alleged class-based discrimination to state a cause of action under § 1985(3). *See Jacobson* v. *Industrial Foundation of the Permian Basin*, 456 F.2d 258 (5th Cir. 1972).

Appellant also makes fleeting reference in his brief to 42 U.S.C. § 1985(2).[8] At no point in his complaint, or

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[8] Section 1985(2) creates a cause of action under the following circumstances:

"If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws; . . ."

even in his motions for leave to amend, did Bricker specifically rely upon that section. He is therefore precluded from asserting it for the first time on appeal since we will not "[o]rdinarily . . . reverse a judgment of the district court on a ground not urged upon it or considered." *Bird v. United States*, 241 F.2d 516, 520 (1st Cir. 1957).

Appellant's claim for relief under 42 U.S.C. § 1981 may be similarly disposed of. That section was not a part of the Civil Rights Act of 1871,[9] and was therefore not raised by even the general and conclusory allegations of the complaint.

Finally, appellant attacks the court's denial of his several motions for leave to amend his complaint as an abuse of discretion. Our reading of his proposed amendments, however, convinces us that nothing contained therein could cure the deficiencies of his original complaint or overcome the effects of collateral estoppel. Under these circumstances, the district court clearly did not abuse its discretion by refusing to allow the requested amendments. *See Foman v. Davis*, 371 U.S. 178, 182 (1962); 3 J. Moore, Federal Practice ¶15.10, at 958-59 (2d ed. 1968).

*Affirmed.*

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[9] *See* Act of May 31, 1870, ch. 114, § 16, 16 Stat. 144.

## APPENDIX B.

## MEMORANDUM OPINION
## of the
## UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

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GLENN W. BRICKER, M.D.
v.
SCEVA SPEARE MEMORIAL HOSPITAL, et al

Civil Action No. 72-10

The motions to dismiss require a careful scrutiny of the pro se complaint, keeping in mind that it is to be construed liberally. The plaintiff alleges that he is a duly licensed physician practicing medicine and surgery in Ashland, New Hampshire; that, in addition, he is an authority in legal medicine and practices legal medicine throughout the Northeastern United States; that he testifies as a medical expert in judicial and administrative proceedings, and has participated in the preparation and trial of medical malpractice cases.

He alleges that the defendants, solely because of his participation in medical malpractice cases, have conspired to deprive him of his capacity to earn a living and to practice medicine in violation of the First, Fifth, and Fourteenth Amendments to the Constitution and in violation of the Civil Rights Act of 1871. (No specific section of the Civil Rights Act is specified.)

The plaintiff claims that, in furtherance of this conspiracy, the defendants caused him to be excluded from the medical staff of the Sceva Speare Memorial Hospital, prohibited him from using the facilities at the hospital for the care and treatment of his patients and have caused a proceeding to be filed with the Board of Registration in Medicine for the State of New Hampshire in an effort to have his medical license either suspended or revoked. (No decision has yet been rendered by the Board of Registration in Medicine for the State of New Hampshire.) The complaint also alleges that the defendants have

caused material alterations in records, suborned perjury in proceedings before State Courts and quasi judicial boards, instituted a double standard at the hospital relative to regulations imposed, obtained the requirement that all members of the hospital staff carry professional liability insurance, and then threatened to cancel and have cancelled his policy because he testified in a medical malpractice case. The same paragraph alleges that the defendants caused false testimony to be introduced at a trial in which the plaintiff was an expert medical witness in order to contradict, discredit, and impeach his testimony previously given at the trial.

For the purposes of this case, the most significant allegation is paragraph 5 in which the plaintiff alleges that he was not notified of the charges against him prior to his exclusion from the medical staff of the defendant hospital. Paragraph 6 alleges that the hospital received monies from the Federal Government under the Medicare program and pursuant to the Hill-Burton Act. (This allegation has not been denied.)

The amended complaint alleges that in furtherance of the conspiracy, the hospital, without notice or hearing, removed the plaintiff from the roster of physicians participating in the emergency call program after a temporary injunction of the Superior Court of the State of New Hampshire had been in effect for eight months, prohibited its staff from using the plaintiff as an assistant or consultant, and prohibited him from attending medical staff meetings. (See the terms of the preliminary injunction issued by me on February 14, 1972.)

Paragraphs 14, 15, and 16 of the amended complaint set forth acts of the defendants Dr. Crane and Attorneys Soden and Milham that have to do with the initiation of the proceedings before the New Hampshire Board of Registration in Medicine to have plaintiff's license to practice medicine revoked, and the conduct of those proceedings. Paragraph 17 of the complaint alleges that Attorney Murphy, as treasurer and attorney for the defendant hospital, gave erroneous information to one or more persons to the effect that the plaintiff was incompetent as a

practitioner of medicine and surgery.

The complaint asserts jurisdiction under 28 U.S.C. § 1343.

Immediately upon receiving notice of his exclusion from the medical staff of the hospital, plaintiff brought a petition for injunction in the Superior Court for the State of New Hampshire and, after two hearings, one on the question of whether or not a preliminary injunction should be issued, and the other on the merits, the New Hampshire Supreme Court upheld the trial court's findings and rulings that the exclusion was justified. Bricker v. Sceva Speare Memorial Hospital, 111 N.H. — (1971), 281 A.2d 589 (1971). The plaintiff's petition for writ of certiorari to the United States Supreme Court was denied on December 14, 1971. United States Supreme Court No. 71-462.

The complaint, as amended, names nineteen different defendants which, for purposes of this opinion, I have separated into five categories: (1) physician members or past members of the medical staff of the Sceva Speare Memorial Hospital, hereinafter referred to as the staff; (2) present or past members of the Executive Committee of the Board of Directors of the Sceva Speare Memorial Hospital, including Attorney Murphy as treasurer, hereinafter referred to as the committee; (3) the Sceva Speare Memorial Hospital, hereinafter referred to as the hospital; (4) the Hartford Insurance Group, a/k/a five different companies, the Travelers Insurance Company, and the Interstate Fire and Casualty Company, hereinafter referred to as the companies; and (5) Attorneys Milham and Soden, hereinafter referred to as the attorneys.

The staff, the hospital, and the committee have moved to dismiss on the grounds of res judicata, collateral estoppel, want of jurisdiction, and lack of color of state law.

The companies moved to dismiss on the grounds of want of proper jurisdiction and failure to state a claim upon which relief can be granted.

Attorneys Milham and Murphy moved to dismiss on the grounds of res judicata, collateral estoppel, the New Hampshire statute of limitations, want of jurisdiction, and failure to state a claim upon which relief can be granted. Attorney Soden moved to dismiss on the last two grounds only.

Liberally construed and stripped to its "federal" essentials, the complaint alleges a conspiracy to deprive the plaintiff of his right to practice medicine because he testifies as an expert witness in medical malpractice cases and that, as part of the conspiracy, the defendants excluded him from the medical staff of the hospital and, in so doing, violated his constitutional right to due process of law by refusing to notify him of the charges against him prior to the hearing on his exclusion. There is nothing in the complaint from which it can reasonably inferred that the plaintiff has been denied his constitutional right to "equal protection" of the law. No racial or class discrimination is alleged or even intimated. The allegations as to proceedings before the New Hampshire Board of Registration in Medicine are anticipatory and do not, at this stage in the proceedings, allege any constitutional violations.

The first question is whether or not the plaintiff has asserted grounds sufficient for federal jurisdiction. While the complaint does not so specify, I assume that plaintiff is relying on both 42 U.S.C. §§ 1983 and 1985. [1] Although I personally have serious reservations as to the advisability of using the Hill-Burton Act as a key to the Federal Courts in any civil rights case and, particularly, one limited to due process, I recognize that the weight of authority holds that the acceptance of Hill-Burton funds is sufficient to cloak a private hospital and its medical

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1. There is no basis for jurisdiction under 28 U.S.C. § 1331(a). Porter v. Bennison, 180 f.2d 523 (10th Cir. 1950).

staff with a mantle of state law. [2] I, therefore, rule that color of state law has been properly alleged and that there is jurisdiction under 28 U.S.C. § 1343(3).

The next question is whether a cause of action upon which relief can be granted has been stated as to the different defendants under 42 U.S.C. § 1983. Bell v. Hood, 327 U.S. 678 (1946); Birnbaum v. Trussell, 347 F.2d 86 (2nd Cir. 1965). The alleged violation of due process clearly involves the staff, the hospital, and the committee, and as to those defendants, I rule that a cause of action has been stated under 42 U.S.C. § 1983. Since no facts have been alleged sufficient to color the actions of the attorneys and companies with state law, they are not members of the class exposed to liability under 42 U.S.C. § 1983. Hanna v. Home Insurance Co., 281 f2d 298 (5th Cir. 1960); Joyce v. Ferrazzi, 323 F.2d 931 (1st Cir. 1963); Contra, Gillibeau v. City of Richmond, 417 F.2d 426 (9th Cir. 1969). Furthermore, the allegations as to the attorneys do not in any way relate to the exclusion of the plaintiff from the medical staff of the hospital. I rule that as to Attorneys Milham and Soden and the companies no cause of action under which relief can be granted has been stated under 42 U.S.C. § 1983.

I next consider whether a cause of action has been stated under 42 U.S.C. § 1985 as to any of the defendants. The recent case of Griffin v. Breckenridge, 403 U.S. 88 (1971), leaves little room for doubt as to the scope and effect of 42 U.S.C. § 1985. Its holding that 42 U.S.C. § 1985 (3) covers private conspiracies without any requirement of color of state law puts to rest the

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2. Sams v. Ohio General Hospital Assoc., 413 F.2d 826 (4th Cir. 1969); Mizell v. North Broward Hospital District, 427 F.2d 468 (5th Cir. 1970); Meredith v. Allen County War Memorial Hospital Com'n., 397 f.2d 33 (6th Cir. 1968); Simkins v. Moses H. Cone Memorial Hospital, 323 f.2d 959 (4th Cir. 1963). But see Powe v. Miles, 407 F.2d 73 (2nd Cir. 1968); Mulvihill v. Butterfield Memorial Hospital, 329 f.Supp. 1020 (S.D.N.Y. 1971).

questions raised by Collins v. Hardyman, 341 U.S. 651 (1951). Griffin also defines the type of conspiracy giving rise to an action under section 1985(3):

> The language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at the deprivation of the equal enjoyment of rights secured by the law to all. At page 102.[3]

While the facts alleged, if proved, would constitute a serious tort against the plaintiff, they do not state a federal cause of action under 42 U.S.C. § 1985 as to any of the defendants.[4]

The motions to dismiss of the defendant attorneys (Attorney Milham and Attorney Soden) are granted. The motions to dismiss of the defendant companies are granted.

Since an action may be maintained for conspiracy to violate rights protected by 42 U.S.C. § 1983, Mizell v. North Broward Hospital District, 427 F.2d 468 (5th Cir. 1970), the plaintiff

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3. See Huey v. Barloga, 277 F.Supp. 864 (N.D.Ill. 1967), for an excellent discussion by Judge Will of 42 U.S.C. §§ 1983 and 1985 actions.

4. There is presently pending in this court a civil tort action against the three insurance companies (Civil No. 3354) alleging a conspiracy to deprive the plaintiff of his right to practice medicine because of his appearance in malpractice cases as a medical expert; jurisdiction is based on diversity of citizenship and jurisdictional amount. 28 U.S.C. § 1332. This case is now in the discovery stage.

The allegations in paragraph 4 of the complaint as to material alterations of court records and subornation of perjury in the New Hampshire State Court proceedings strongly suggests the possibility of State criminal proceedings.

can proceed against the hospital, staff, and the committee unless he is barred by the doctrine of res judicata and collateral estoppel. [5] In Rankin v. State of Florida, 418 F.2d 482 (5th Cir. 1969), the court defined res judicata as follows:

> The doctrine of res judicata provides that, if a previous judgment is valid, and on the merits, it is an absolute bar in another case on the same cause of action between the same parties and their privies not only in respect of every grounds of recovery or defense which were presented but also as to every ground of recovery or defense which might have been presented.

Whether the plaintiff is barred from proceeding in the Federal Court depends upon what issues were actually decided in the State Court. The entire record of the New Hampshire State Court proceedings has been made available and is an exhibit for purposes of this decision.

In May, 1971, a hearing was held in the New Hampshire Superior Court on plaintiff's petition for an injunction against the hospital. Plaintiff alleged and attempted to prove that the hospital violated its bylaws and denied him his right to due process of law by not giving him a statement of the charges against him before he was dismissed from the hospital staff. The trial court found:

> There was no requirement under the bylaws, or under general common law, that Dr. Bricker be given a written specification of the charges to be made against him prior to the vote on his reappointment. At page 4 of Decree.

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5. The term res judicata is frequently used to cover merger, bar, collateral estoppel, and direct estoppel. Lawlor v. National Screen Service, 349 U.S. 322, 326, N.6 (1955). See Restatement, Judgments, sections 47, 48, and 68 (1942, 1948 Supp.).

The New Hampshire Supreme Court upheld the decision of the trial court and ruled:

> The initial question is the extent that the exclusion of a physician from staff privileges in a hospital is subject to review by the courts. Generally courts have drawn a distinction in such cases between public and private hospitals. See Annot., 37 A.L.R.3d 645 (1971); The Physician's Right to Hospital Staff Membership: The Public-Private Dichotomy, Wash. U.L.Q. 485 (1966). In the present case the acceptance of federal and town funds in addition to private contributions and income from patient care has not changed the private character of the defendant hospital. Bricker v. Sceva Speare Memorial Hospital, supra, at pages 591-592.

The Court went on to hold that the public has such a substantial interest in private hospitals that "exclusion from staff privileges must be done in accordance with the bylaws of the hospital," page 592, and that the staff's failure to reappoint the plaintiff was not arbitrary, capricious or unreasonable.

Plaintiff then petitioned for a writ of certiorari to the United States Supreme Court, which was denied. Plaintiff's next step was the filing of this complaint.

It is clear that the Federal constitutional question of due process was not decided by the State Court since the preliminary issue of state involvement sufficient to give rise to such due process rights was decided adversely to the plaintiff. It may be that the State Court incorrectly decided the question of state action. That would indeed be unfortunate since there can be no cause of action under 42 U.S.C. § 1983 without first crossing the threshold of "color" of state law. But whether the New Hampshire decision as to lack of state action was correct is immaterial since, when certiorari was denied by the United States Supreme Court, the matter was at an end because that

was the plaintiff's only and final recourse.[6] The degree of state action necessary to sustain a complaint under 42 U.S.C. § 1983 can certainly be no less than that required to violate the Fourteenth Amendment right to due process since the cause of action is no broader than the right it is intended to protect. Since the New Hampshire Supreme Court has decided that there was no prohibition state action on the part of the hospital sufficient to invoke the Fourteenth Amendment, the plaintiff is estopped from again raising the issue for a claimed violation of his civil rights under 42 U.S.C. § 1983.

I realize that res judicata should be used sparingly in civil rights actions and that its application is only proper when there has been a previous action between the same parties or their privies involving the same subject matter, and terminating in a final judgment on the merits. Rhodes v. Jones, 351 F.2d 884 (8th Cir. 1965); Frazier v. East Baton Rouge Parish School Board, 363 F.2d 861 (5th Cir. 1966). In this action, the plaintiff has added new defendants and alleged a new cause of action. But the addition of individual members of the medical staff, the hospital's executive committee, and Attorney Murphy, and the allegation of conspiracy does not afford new grounds for finding "color" of state law.

The doctrine of collateral estoppel requires that the earlier decision and judgment on the merits bar relitigation of this issue, even though the State Court decision was based on a different cause of action. Lawlor v. National Screen Service, 349 U.S. 322, 326 (1955). Even if I assume that privity of

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6. There is a difference of opinion as to the effect of the denial of a petition for writ of certiorari, but while the denial itself may not be authority for any kind of a Supreme Court holding, it does at least signify that the United States Supreme Court has, for some reason, decided not to hear the case and the appellate procedure has terminated. See Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912 (1950).

parties is required in the issue preclusion type of res judicata, the facts and circumstances show that the staff and committee are closely connected with the hospital and are entitled to the benefit of the New Hampshire Supreme Court ruling that this was a private hospital.

A Federal District Court cannot review a question already decided by a State Court. Skolnick v. Martin, 317 F.2d 855 (7th Cir. 1963); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); 1B Moore's Federal Practice 934 (1965). There is an exception to the rule in habeas corpus proceedings, Fay v. Noia, 372 U.S. 391 (1963), but this exception has not been extended to civil rights suits. Rhodes v. Meyer, 334 F.2d 709 (8th Cir. 1964).[7]

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7. Kauffman v. Moss, 420 F.2d 1270 (3rd Cir. 1970), and Mulligan v. Schlacter, 389 F.2d 231 (6th Cir. 1968), are not contra; they merely hold that an unreversed conviction cannot by itself require dismissal as res judicata.

Where Federal District Courts have not dismissed on the grounds of res judicata, the Supreme Court has overruled or later expressed disagreement. Howard v. Ladner, 116 F.Supp. 783 (S.D.Miss., Jackson Div. 1953), vacated White, et al v. Howard, et al, 347 U.S. 910 (1954); Tribune Review Publishing Co. v. Thomas, 153 F.Supp. 486 (W.D.Pa. 1957) aff'd. 254 F.2d 883 (3rd Cir. 1958), criticized in England v. Medical Examiners, supra.

I am aware of Judge Rives' dissent in Brown v. Chastan, 416 F.2d 1012 (5th Cir. 1969), in which he argues that civil rights cases should not be barred from the Federal Courts by the doctrines of res judicata and collateral estoppel. It is to be noted also that the A.L.I. study of The Division of Jurisdiction Between State and Federal Courts, Tentative Draft No. 6, 72 (1968) takes the view that the jurisdiction of the Federal Courts should be extended to cover all cases in which the meaning or application of the Constitution, law, or treaties of the United States is a principal element in the position of either party. But the A.L.I. Draft recognized that this view is not the law.

Res Judicata and collateral estoppel aside, the holding and reasoning of England v. Medical Examiners, 375 U.S. 411 (1964), is an insurmountable barrier to plaintiff's advance into this court:

> It might be argued that nothing short of what was done in Button should suffice – that a litigant should retain the right to return to the District Court unless he not only litigates his federal claims in the state tribunals but seeks review of the state decision in this Court. But we see no reason why a party, after unreservedly litigating his federal claims in the state courts although not required to do so, should be allowed to ignore the adverse state decision and start all over again the District Court. Such a rule would not only countenance an unnecessary increase in the length and cost of the litigation; it would also be a potential source of friction between the state and federal judiciaries. We implicitly rejected such a rule in Button, when we stated that a party elects to forgo his right to return to the District Court by a decision "to seek a complete and final adjudication of his rights in the state courts." We now explicitly hold that if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then – whether or not he seeks direct review of the state decision in this Court – he has elected to forgo his right to return to the District Court. At pages 418-419.

I realize that England is an abstention case but its reasoning applies with full force to this situation. Unlike the plaintiffs in England, Dr. Bricker chose the State Court initially as his forum. He could have started in this court or, having brought suit in the State Court, limited his claim to a violation of the hospital bylaws; in either case, his option of an initial Federal District Court determination on the "color" of state law issue

would have remained open. He lost that option by litigating his Federal claims to final judgment in the State Court.

The motions of the defendant hospital, staff, and committee, including Attorney Murphy, to dismiss are granted.

No costs to any party.

The preliminary injunction shall remain in full force and effect until the appeal period expires, or, if an appeal is taken from this order, until final decision.

SO ORDERED.

Hugh H. Bownes
United States District Judge

March 3, 1972

cc: Peter V. Millham, Esq.
Frederic K. Upton, Esq.
Martin L. Gross, Esq.
E. Donald Dufresne, Esq.
Philip G. Peters, Esq.
Paul E. Nourie, Esq.
E. Paul Kelly, Esq.
John Chandler, Esq.
Glenn W. Bricker, M.D.

Notice of Appeal shall be filed with the Clerk of the District Court within 30 days of the date of the entry of the order appealed from.

This note was attached to Dr. Bricker's copy of Memorandum Opinion, 3/3/72.

## ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

| | | |
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| GLENN W. BRICKER, M.D. | ) | |
| v. | ) | Civil Action No. 72-10 |
| HENRY D. CRANE, JR., M.D., et al | ) | |

1. The motion of the plaintiff that the memorandum opinion and order of the court dated March 3, 1972, be altered and amended is denied. The plaintiff is given permission to include as part of the record in this case the transcript of the hearing before Justice Johnson of the New Hampshire Superior Court at Lebanon, New Hampshire, on Wednesday, January 12, 1972.

2. The motion of the plaintiff to amend the complaint is denied.

My order of March 3rd terminated the proceedings in this court. The only recourse now of the plaintiff is by appeal to the First Circuit Court of Appeals. If the plaintiff is not sure of the appeal procedure, he should contact the clerk of court.

SO ORDERED.

Hugh H. Bownes
United States District Judge

March 14, 1972

cc: Glenn W. Bricker, M.D.
Philip G. Peters, Esq.
Paul E. Nourie, Esq.
Martin L. Gross, Esq.
Peter V. Millham, Esq.
Frederic K. Upton, Esq.
E. Paul Kelly, Esq.

E. Donald Dufresne, Esq.
Irving Soden, Esq.
Walter Murphy, Esq.

## APPENDIX D.

## ADDENDUM TO THE MARCH 14, 1972 ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

| | | |
|---|---|---|
| GLENN W. BRICKER, M.D. | ) | |
| | ) | Civil Action No. 72-10 |
| v. | ) | |
| HENRY D. CRANE, JR., M.D., et al | ) | |

The entire record of the state court proceedings and the pleadings and memoranda filed in the instant case have been carefully considered. I conclude that there is nothing in plaintiff's motions to amend which could not have been presented earlier and that none of the allegations contained in the motions set forth a basis for finding "color" of state law.

Hugh H. Bownes
United States District Judge

March 22, 1972

cc: Glenn W. Bricker, M.D.
Philip G. Peters, Esq.
Paul E. Nourie, Esq.
Martin L. Gross, Esq.
Peter V. Millham, Esq.
Frederic K. Upton, Esq.
E. Paul Kelly, Esq.
E. Donald Dufresne, Esq.
Irving Soden, Esq.
Walter Murphy, Esq.

## APPENDIX E.

## RULINGS AND ORDER ON PLAINTIFF'S MOTION TO AMEND THE COMPLAINT AND FOR ALTERATION AND AMENDMENTS TO PRIOR ORDERS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

GLENN W. BRICKER, M.D. )
)
v. ) Civil Action No. 72-10
)
HENRY D. CRANE, JR., M.D., et al )

The motion is denied.

In his present motion, the plaintiff has alleged new acts which have occurred since the filing of his initial complaint and have, in fact, occurred after the order and memorandum opinion of the court dated March 3, 1972. The facts alleged in the motion may or may not tend to prove the conspiracy alleged in the original complaint, but they cannot be used as a means of avoiding my order of March 3rd. If all that the plaintiff wishes to do is to allege further facts which he feels will help prove the conspiracy alleged in the original complaint, then, even if such amendment were allowed, it would in no way affect the ruling of the New Hampshire Supreme Court that state action was not involved in the dismissal of the plaintiff from the Sceva Speare Memorial Hospital. In the event that I was in error in dismissing the plaintiff's original complaint, the facts now alleged in the motion to amend can be proven at the trial, whether or not they become a part of the complaint itself, if they have sufficient probative value.

Since the plaintiff is appearing pro se, it is only fair to point out to him that the facts alleged in the latest motion to amend may constitute a new and independent cause of action based on violation of due process. I make no ruling at this time as to the validity of such cause of action under the Civil Rights statutes.

At the time my opinion of March 3, 1972, was sent to the plaintiff, I attached to it a statement to the effect that: "Notice of Appeal shall be filed with the Clerk of the District Court within 30 days of the date of the entry of the order appealed from." On March 14, 1972, I noted in the final paragraph of my order as follows:

> My order of March 3rd terminated the proceedings in this court. The only recourse now of the plaintiff is by appeal to the First Circuit Court of Appeals. If the plaintiff is not sure of the appeal procedure, he should contact the clerk of court.

To date no notice of appeal has been filed in this court. The plaintiff is advised that motions to amend a complaint do not automatically extend the time of appeal.

SO ORDERED.

Hugh H. Bownes
United States District Judge

April 3, 1972

cc: Glenn W. Bricker, M.D.
Philip G. Peters, Esq.
Paul E. Nourie, Esq.
Martin L. Gross, Esq.
Peter V. Millham, Esq.
Frederic K. Upton, Esq.
E. Paul Kelly, Esq.
E. Donald Dufresne, Esq.
Irving Soden, Esq.
Walter Murphy, Esq.

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